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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921-DFM

Hon. Douglas F. McCormick

**DEFENDANT AND COUNTERCLAIMANT'S WINDERMERE REAL ESTATE SERVICES COMPANY'S TRIAL BRIEF**

Trial Date: July 10, 2018
Courtroom: 6B

Complaint Filed: September 17, 2015

Defendant and Counterclaimant Windermere Real Estate Services Company ("WSC") hereby respectfully submits this Trial Brief in advance of the July 10, 2018 trial in the above-captioned case. At this point, the Court is likely familiar with the underlying facts in this case.[1] Accordingly, this brief is submitted to apprise the Court of certain legal issues that WSC anticipates will arise during trial. Those issues include (1) Plaintiffs' continued and improper reference to WSC's alleged "constructive termination" of the Area Representation Agreement ("ARA"); (2) Plaintiffs' purported affirmative defense of "justification"; and (3) Plaintiffs' argument that any ambiguities in the ARA should be construed against WSC. Each presents an issue of law of which the Court should be aware, and consideration should be given as to whether any of these matters should be presented to the jury.

1. Constructive Termination is Not Recognized in California Outside of the Employment Context

Plaintiffs contend that the ARA was "constructively terminated" due to WSC's alleged prior breaches of that agreement. However, there is not a single California statute or case that recognizes "constructive termination" as a basis for a contract's termination. A Westlaw search of "constructive termination" in California produces 192 results. A search of "constructively terminated" produces 101 results, some of which are duplicative of the initial search. None of the results for either search recognizes "constructive termination" as anything other than within the context of an employment case.[2] In short, Plaintiffs' fictitious "constructive termination" theory has no basis in California jurisprudence.

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[1] To the extent the Court seeks a recitation of the relevant facts, that can be found in WSC's Memorandum of Contentions of Fact and Law, Dkt. # 52.

[2] Although *California ARCO Distributors, Inc. v. Atlantic Richfield Co*. (1984) Cal.App.3d 349 involved a claim by the plaintiffs that a franchise had been constructively terminated, the court did not address the merits of that claim. Instead, the court only addressed whether those claims were preempted by the Petroleum Marketing Practices Act, which governed the franchise in that case.

During oral argument on WSC's Motion *in Limine* to Exclude Opinion of Plaintiffs' Expert Peter Wrobel re: Net Value, Plaintiffs' counsel intimated that there were cases dealing with "constructive termination" in the service/gas station context. However, a review of those cases reveals that "constructive termination" arises ***only*** in that context due to application of the Petroleum Marketing Practices Act. *See, e.g., Mac's Shell Service, Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175 (2010); *Little Oil Co., Inc. v. Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988); *Harara v. ConocoPhillips Co*., 377 F.Supp.2d 779 (N.D. Cal. 2005); *California ARCO Distributors, Inc. v. Atlantic Richfield Co*., 158 Cal.App.3d 349 (1984). The Petroleum Marketing Practices Act has no application in this case.

The only other situations in which the term "constructive termination" arises is in the contexts of the laws of other states and federal laws governing dealership franchising. *See, e.g., Grimes Buick-GMC, Inc. v. GMAC, LLC*, 2013 WL 5348103, *5-6 (D. MT. 2013) (applying federal Automobile Dealers' Day in Court Act and similar Montana law on auto dealer/franchises); *Estes Automotive Group, Inc. v. Hyundai Motor America*, 2011 WL 1153371 (C.D. Cal. 2011) (applying Automobile Dealers' Day in Court Act); *Girls Scouts of Manitou Council v. Girl Scouts of U.S.A. Inc.*, 700 F.Supp.2d 1055 (E.D. Wis. 2010), aff'd in part, rev'd in part on other grounds, 646 F.3d 983 (7th Cir. 2011) (applying Wisconsin dealership law). Importantly, however, Plaintiffs' "constructive termination" theory only applies to the ARA, and the Court has already determined that the ARA is not a franchise agreement. (Dkt. # 66, p. 7, ll. 19-20.) Plaintiffs do not allege that the franchise agreements were constructively terminated because they were the ones who terminated those agreements.

Because "constructive termination" is not a recognized principle of California law, Plaintiffs should be precluded from arguing it at trial.[3]

[3] Tellingly, Plaintiffs have not submitted a proposed jury instruction regarding the elements of constructive termination under California law or otherwise.

2. Justification is Not a Recognized Affirmative Defense to Contract Claims

Plaintiffs' position that "justification" is an affirmative defense to a contract claim is mistaken. This defense applies to claims for tortious interference with contractual relations or prospective economic advantage, not to claims for breach of contract. *See Herron v. State Farm Mutual Ins. Co.*, 56 Cal.2d 202, 206-207 (1961); *Sade Shoe Co. v. Oschin & Snyder*, 162 Cal.App.3d 1174, 1180 (1984). In fact, the relevant factors enumerated in *Herron* "were patterned closely after those listed in the original Restatement of Torts (1939) section 767." *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 194, fn. 3 (1984).

Thus, like their novel "constructive termination" theory, Plaintiffs' "justification" affirmative defense is not supported by California law. Therefore, this purported affirmative defense should not be submitted to the jury.[4]

3. Ambiguities in the ARA Can Only be Construed Against WSC if the Parties Did Not Negotiate its Terms

In opposition to WSC's most recent motion for partial summary judgment regarding interpretation of the ARA, Plaintiffs argued that any ambiguities in the ARA should be construed against WSC as the drafter of that agreement.[5] In support of this contention, Plaintiffs cited to *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111 (E.D. Cal. 1996). (Dkt. # 157, p. 18.) The court in that case applied federal common law and the doctrine of *contra proferentem* to a contract where the United States was a party and the contract was entered into pursuant to federal law.

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[4] Not surprisingly, Plaintiffs have also failed to submit a proposed jury instruction regarding justification as an affirmative defense.

[5] WSC did not contest Plaintiffs' contention at that time because it did not believe the relevant portion of the ARA was ambiguous and, thus, did not want to create a potential issue of fact.

*Id*. at 1135-1137. California follows a similar rule, codified at Civil Code section 1654. However, under California law, when an agreement is arrived at by negotiation, the "preparer" principle is not to be applied against either party. *See Herring v. Teradyne, Inc.,* 256 F.Supp.2d 1118, 1126 (S.D. Cal. 2002) reversed on other grounds by 242 Fed.Appx. 469 (9th Cir. 2007) ("In California, where an agreement is actively negotiated - as were the Merger Agreements in this action - this 'preparer' principle is not applied against either party.").

Accordingly, to the extent evidence is presented establishing that the terms of the ARA were reached by negotiation, any ambiguities in that agreement should not be construed against either party.

DATED: June 27, 2018 PEREZ VAUGHN & FEASBY INC.

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